UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. WALKER, Comptroller General of the United States, Plaintiff, v. RICHARD B. CHENEY, Vice President of the United States and Chair, National Energy Policy Development Group, Defendant.	)	Civil Action No. 1:02CV00340 (JDB)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff David M. Walker, Comptroller General of the United States, brings this action to enforce his statutory right under 31 U.S.C. §§ 712, 716, and 717 to obtain records necessary to discharge his congressionally delegated responsibilities to investigate all matters relating to the use of public money and to evaluate the results of federal government activities and programs. Specifically, the Comptroller General seeks a declaration that he is entitled to the production of a narrowly defined category of records, identified in his statutory report dated August 17, 2001, relating to the composition and activities of the National Energy Policy Development Group ("NEPDG"), and an injunction directing the defendant Richard B. Cheney, in his capacity as Vice President of the United States or as Chair of the NEPDG, to produce those records. Plaintiff has satisfied all statutory prerequisites to suit, and has exhausted all reasonable means of reaching an accommodation. Because the Vice President insists that his activities as chair of the NEPDG, and the activities of the NEPDG staff, are beyond the Comptroller General's authority to investigate and evaluate, the Comptroller General has no alternative but to commence this action. The Comptroller General's motion presents pure questions of law, as to which there are

no material facts in dispute. As the Comptroller General demonstrates below, he is entitled to summary judgment as a matter of law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two straightforward propositions resolve this case in favor of the Comptroller General. First, two separate statutory provisions, §§ 712 and 717 of title 31, United States Code, each provide independent authority for the Comptroller General to investigate the activities of the NEPDG, a federally funded task force chaired by the Vice President and charged with developing a national energy policy. Second, § 716 of title 31 authorizes the Comptroller General to bring suit against the Vice President for records relating to the NEPDG's activities.

Section 712 authorizes the Comptroller General to "investigate all matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712(1). Section 717, in turn, authorizes him, on his own initiative or at the request of a committee of Congress with appropriate jurisdiction, to "evaluate the results of a program or activity the Government carries out under existing law." *Id.* § 717(b)(1) & (3). Pursuant to these expansive grants of authority, the Comptroller General has initiated an investigation of the NEPDG and has requested basic records concerning the NEPDG's costs, its meetings, and meetings held by the Vice President or the NEPDG staff that were attended by non-federal parties. The Vice President, however, has declined to provide most of these records, maintaining that §§ 712 and 717 entitle the Comptroller General to documents reflecting only individual NEPDG expenditures.

As set forth in detail below, the language, structure, history, and purpose of these provisions make clear that the Comptroller General is entitled to all of the records in dispute in this action. Written in sweeping terms, § 712 authorizes the Comptroller General to investigate not merely each individual disbursement of federal funds, but "*all* matters *related to* the receipt,

disbursement, *and use* of public money." *Id*. § 712(1) (emphases added). This broad language makes clear that Congress intended the Comptroller General to act as an investigator, not simply as an accountant concerned with receipts and disbursements, and the legislative history confirms this understanding. All of the NEDPG's meetings indisputably involved the "use of public money." The information requested by the Comptroller General is relevant to investigating several matters "related to" that use, including, among other things, the purposes for which public money was used; the efficiency and effectiveness of that use; the applicability of the Federal Advisory Committee Act ("FACA") to that use; and the desirability of additional appropriations restrictions to control the use of public money for energy policy development in the future.

Section 717 confers on the Comptroller General similarly broad, and in many respects overlapping, authority to "evaluate the results of a program or activity the Government carries out under existing law." *Id.* § 717(b). The formulation of a national energy policy by eight department or agency heads and the Vice President is plainly an "activity the Government carries out under existing law," and information about the NEPDG task force meetings and the meetings with non-federal parties regarding that policy is directly germane to evaluating the "results" of that activity. Such information will enable the Comptroller General, and the Congress, to evaluate the most obvious result of the NEPDG's activities, the policy proposals, by revealing whether they were the product of a well-balanced and comprehensive fact-gathering process. In addition, the information will allow the Comptroller General, and the Congress, to evaluate whether another result of the NEPDG's activities—the degree of public input elicited—realized Congress's objective of broad and open public participation in the formulation of national energy policy.

The fact that the NEPDG provided the President with the opinions of department heads, and was formed, according to the Vice President, to help the President take care that the laws are faithfully executed and recommend legislative measures to Congress, does not place the NEPDG's activities beyond the purview of § 717. By its plain terms, the statute authorizes the Comptroller General to evaluate activities carried out under any federal law, constitutional or statutory, that exists or is in effect. Indeed, when it enacted § 717, Congress was advised of, and ratified, the Comptroller General's emerging practice of examining, among other things, activities conducted pursuant to the President's inherent constitutional authority to protect the nation's security. In any event, the NEPDG's activities were necessarily based, at least in part, on statutory authorities that charged the President and other executive branch officials with formulating policies to administer energy-related laws and proposing draft energy legislation.

Section 716 establishes the Comptroller General's right to inspect agency records and authorizes him to enforce that right by bringing a civil action "to require the head of the agency to produce a record." *Id*. § 716(b)(2). The statute defines the term "agency" broadly to include any "department, agency, or instrumentality of the United States Government," *id.* § 101, excluding "the legislative branch or the Supreme Court," *id.* § 701. Because this exemption does not extend to any aspect of the executive branch, the term "agency" under § 716 necessarily embraces all instrumentalities of the executive branch, including both the NEPDG and the Office of the Vice President ("OVP"). Indeed, the structure and legislative history of § 716 make unmistakably clear that the Comptroller General's authority to investigate and evaluate federal spending and activities extends to the activities of the President's closest advisers. For that very reason, § 716(b) authorizes the President or the Director of the Office of Management and Budget ("OMB") to preclude a suit for records by making a certification that the records contain

deliberative material, the disclosure of which would "impair substantially the operations of the Government"—a certification that neither the President nor the Director of OMB made with respect to the materials requested here.

Ordinary principles of statutory construction are sufficient to resolve this case. But the statutes at issue are, in one important respect, far from ordinary. Congress enacted §§ 712, 716, and 717 as necessary and proper exercises of Congress's core powers to oversee the activities of the executive branch, to control the use of federal funds, and to gather information essential to perform the legislative function. These statutes, moreover, grant rights not to the general public, but to an agent of the legislative branch itself, an agent Congress created in order to secure necessary assistance in the exercise of its oversight, appropriations, and lawmaking powers. In enacting these statutes, Congress knew that it was authorizing the examination of deliberative materials, and fully appreciated the separation of powers implications of such authority. Indeed, Congress accommodated the institutional interests of the executive branch by affording the President statutory means to protect sensitive information. Given the co-equal status of the two political branches, and Congress's careful accommodation of the President's needs, there is no legitimate basis for declining to enforce the Comptroller General's authority in accordance with the plain meaning, and clear purposes, of those statutes.

Although the Comptroller General has the right, absent a presidential or OMB certification, to review materials reflecting the deliberations of the President's most senior advisers, he does *not* seek, in this action, records reflecting the NEPDG's deliberations on policy recommendations to the President. In order to accommodate the Vice President's asserted need to protect such deliberative materials, and in the interest of comity, the Comptroller General long ago eliminated any request for minutes and notes from NEPDG meetings. He also agreed to

forgo his right to review any of the materials or information provided by parties outside the government to the Vice President or the staff of the NEPDG. Through this lawsuit, the Comptroller General seeks only documents setting forth the identities of the attendees at each of the NEPDG's task force meetings; the dates, subjects, agendas, and locations of the meetings with non-federal parties held by the Vice President as Chair of the NEPDG, or the NEPDG support staff, and the identities of the parties in attendance; the method by which the NEPDG members or staff determined which non-federal parties to invite to these meetings; and the NEPDG's direct and indirect costs. In light of his clear statutory authority to obtain such records, the Comptroller General is entitled to summary judgment and accompanying declaratory and injunctive relief.

BACKGROUND

The Creation of GAO

Any evaluation of the Comptroller General's authorities under §§ 712 and 717 must take into account the context in which Congress conferred those powers. Congress created the position of the Comptroller General, and the agency he heads, the United States General Accounting Office ("GAO"), in order to assist Congress in the discharge of its core constitutional powers—the power to investigate and oversee the activities of the executive branch, the power to control the use of all federal funds, and the power to make laws. Although the Constitution does not expressly mention the first of these powers, "the power to investigate is inherent in the power to make laws." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975). Congress has exercised oversight authority since the second Congress,[1] and the

[1] In 1792, the House of Representatives appointed a select committee to inquire into the failure of General St. Clair's military expedition against the Indians, and authorized the committee "'to call for such persons,

(continued…)

Supreme Court has long recognized this authority. In *McGrain v. Daugherty*, 273 U.S. 135 (1927), the Court explained that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. In *Watkins v. United States*, 354 U.S. 178 (1957), the Court made clear that Congress's investigative power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Id.* at 187. Indeed, the Court has made clear that Congress may investigate any subject "on which legislation could be had," *McGrain*, 273 U.S. at 177, and that Congress's investigative power is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

The Constitution expressly confers on Congress plenary power over the use of all federal funds. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Appropriations Clause seeks "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *OPM v. Richmond*, 496 U.S. 414, 428 (1990); *see also Hooe v. United States*, 218 U.S. 322, 333 (1910) ("It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation."). These difficult judgments involve "not only legislative specifications of money *amounts*, but also legislative specifications of the *powers*, *activities*, and *purposes* . . . for which appropriated funds may be used." *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J.

(…continued)
papers, and records, as may be necessary to assist their inquiries.'" *See* 2 Annals of Cong. 493 (1792); *see also McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

1343, 1352 (1988); *see also* Alexander Hamilton, *Explanation*, Nov. 11, 1795, *in* 8 *Works* 122, 128 (H.C. Lodge ed., 1885) ("no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed").

Since the earliest days of the Republic, Congress has passed numerous statutes to control the powers, activities, and purposes for which federal funds are used. In 1809, for example, Congress passed legislation requiring that "the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other." Act of March 3, 1809, ch. 28, § 1, 2 Stat. 535, 535. This Act was the precursor to the so-called Purpose Statute, which today provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). In 1870, Congress passed the original version of the Antideficiency Act, which made it unlawful "for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (subsequently codified as § 3679, 18 Stat. 723, pt. 1 (1870)). Congress has amended this Act on numerous occasions, most notably by adding criminal penalties (as well as the sanction of removal from office) for its violation, prohibiting the provision of voluntary services, and requiring appropriations to be apportioned over the course of a fiscal year.[2]

Despite its plenary authority over the use of federal funds and its broad oversight powers, for more than a century Congress largely depended on executive branch officials in the Department of the Treasury to ensure that the executive branch carried out appropriations in

conformance with the law. *See* H.R. Rep. No. 67-14, at 7 (1921); *see also* Frederick C. Mosher, *The GAO: The Quest for Accountability in American Government* 38-39 (1979). Congress created GAO and the position of the Comptroller General in 1921 in order to bring an end to this dependency. In adopting the Budget and Accounting Act, 1921, ch. 18, 42 Stat. 20 ("1921 Act"), Congress explained:

> Under the present plan the Congress has no power or control over appropriations after they have once been made. It has no knowledge as to how expenditures are made under these appropriations, and inasmuch as the Comptroller of the Treasury and the six auditors owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments.

H.R. Rep. No. 67-14, at 7.

In the 1921 Act, Congress abolished the offices of the Comptroller of the Treasury and the six auditors, conferred on GAO all their duties and powers as well as additional ones, and provided for GAO's independence by giving its head, the Comptroller General, tenure during good behavior and retaining for Congress, rather than the President, the power of removal. *See* 1921 Act, §§ 301-317, 42 Stat. at 23-27. The creation of an "independent establishment," Congress explained, was "[t]he only way by which Congress can hold a check on expenditures." H.R. Rep. No. 67-14, at 7. Congress did more, however, than simply transfer the accounting functions of the Treasury Department to its new legislative agent. Whereas the Treasury Department had concerned itself largely with reviewing the legality and accuracy of financial transactions, *see* Mosher, *supra*, at 38-39, Congress expected GAO to play a broader role in investigating the use of federal funds.

(…continued)

[2] *See* Act of March 3, 1905, ch. 1484, sec. 4, § 3679, 33 Stat. 1214, 1257-58. Today, the Antideficiency Act is codified at 31 U.S.C. §§ 1341-1342, 1349-1351, 1511-1519.

Indeed, it was precisely to emphasize the breadth of the Comptroller General's duties that Congress amended an earlier version of the bill that became the 1921 Act. As initially drafted, § 312 authorized the investigation of "all matters relating to the receipt and disbursement of public funds." *See* 67 Cong. Rec. 1090 (1921). Fearing that this authority would be interpreted too narrowly, the bill was amended to include the term "application" (which in the 1982 recodification of title 31 was changed, without substantive effect, to "use," *see infra* note 13). *See* 67 Cong. Rec. 1090. Thus, as originally enacted, the predecessor to § 712 authorized the Comptroller General to "investigate . . . all matters related to the receipt, disbursement, and application of public funds." *See* 1921 Act, § 312(a), 42 Stat. at 25; *see also infra* pp. 29-31.

GAO's Move to Program Reviews and the Adoption of Section 717

Notwithstanding its broad grant of investigative authority, GAO focused in the early decades of its existence primarily on ensuring compliance with the appropriations laws. *See* Mosher, *supra*, at 72-79; *see also* National Acad. of Pub. Admin. ("NAPA"), *The Roles, Mission and Operation of the U.S. General Accounting Office*, S. Print No. 103-87, at 2 (Comm. Print 1994). In the 1960s, however, GAO began to expand and shift its focus into the areas of program evaluation and policy analysis. *See Capability of GAO to Analyze and Audit Defense Expenditures: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 91st Cong. 3-7 (1969) (statement of Hon. Elmer B. Staats, Comptroller General) (hereinafter "GAO 1969 Hearing"); *see also* NAPA, *supra*, at 3; Mosher, *supra*, at 174-81. Many of these analyses examined the effectiveness of federal spending programs, and thus fell squarely within GAO's existing investigative authority. In others, however, GAO did not concern itself principally with matters related to the use of public money—such as whether funds were used efficiently or whether the use of such funds complied with applicable appropriations and other statutory restrictions—and instead focused on broader

questions of public policy. In conducting the latter type of reviews, GAO began to develop new analytical models, distinct from those employed in its efficiency and economy investigations. Using such models, GAO identified the non-fiscal objectives of federal programs and activities, assessed the procedures used to achieve those objectives, and evaluated whether the programs and activities were meeting those objectives. *See* GAO 1969 Hearing at 33-34 (Exhibit 1, Statement of Elmer B. Staats on the Role of the GAO in Reviewing the Results of Federal Programs); *see also* Mosher, *supra*, at 174-81.

Congress formally ratified this policy evaluation role in the Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 ("1970 Act"), which expressly authorized GAO to conduct program reviews (also known at the time as "program results reviews"[3]) and made clear that the role of GAO was to "analyze," not simply to "investigate." Section 204(a) of the 1970 Act provided in pertinent part, "The Comptroller General shall review and analyze the results of Government programs and activities carried on under existing law." 1970 Act § 204(a) (codified as amended at 31 U.S.C. § 717). As the Committee Report explained, "It is intended that, in performing this function, the Comptroller General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." H.R. Rep. No. 91-1215, at 82 (1970). As a result of its expanded mandate, GAO undertook an increasing number of reviews requiring expertise beyond auditing and accounting, and the professional cadre at GAO changed dramatically as the agency hired individuals with training in a variety of disciplines, such as public administration, law, and the social sciences. *See* Mosher, *supra*, at 191-94. This express

[3] *See* GAO 1969 Hearing at 7 (testimony of Comptroller General Elmer Staats discussing "the role of the GAO in the review of what you, Mr. Chairman, have referred to in the past as program results, or what might be simply

(continued…)

grant of authority to conduct program reviews reflected Congress's understanding of GAO as an agency that assisted Congress in the performance of not simply its appropriation function, but more broadly its legislative function.

GAO's Litigation Authority

When Congress established GAO in 1921, it made clear that the executive branch was obligated to furnish the Comptroller General with all "information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their . . . offices" that he requested of them, and that the Comptroller General had the right to access and examine any records of the executive branch. 1921 Act, § 313, 42 Stat. at 26. Despite its right, and the executive branch's corresponding duty, GAO encountered obstacles over the years in securing from the executive branch, including the White House, the information and records necessary to perform its statutory responsibilities. *See* S. Rep. No. 96-570, at 5 (1980); H.R. Rep. No. 96-425, at 4 (1979). Indeed, as GAO expanded its investigations and reviews into non-fiscal areas, the executive branch began to challenge GAO requests for information with increasing frequency. *See General Accounting Office Act of 1979: Hearings on H.R. 24 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong. 88-89, 92-94, 108-09 (1979) ("1979 Hearing") (Statement of James T. McIntyre, Jr., Director, Office of Management and Budget). These difficulties, Congress found, compromised GAO's ability to respond to congressional needs in a timely and thorough manner. *See* S. Rep. No. 96-570, at 5; H.R. Rep. No. 96-425, at 4.

(…continued)
termed as program reviews to emphasize output, the effectiveness of programs as against the more narrow review of management efficiency.").

In the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311 ("1980 Act"), Congress responded to a request by the then Comptroller General to "'put GAO and the Congress on an equal footing with the executive branch'" for the resolution of records disputes, H.R. Rep. No. 96-425, at 9, by creating a statutory framework to enable GAO to enforce its right of access to records held by the executive branch. Mindful of the executive branch's need to maintain the confidentiality of certain types of records, Congress deliberately structured the enforcement mechanism in a manner that accommodated that interest and respected the constitutional separation of powers. *See* S. Rep. No. 96-570, at 6-8. Thus, the Comptroller General may institute judicial enforcement actions to compel the production of records, but only after exhausting a set of detailed procedures. *See* 1980 Act, sec.102(b), § 313, 94 Stat. at 312-13 (codified as amended at 31 U.S.C. § 716(b)). These prerequisites to suit include making a formal written request to the appropriate executive branch official setting forth the authority and reason for the request, waiting at least 20 days for a response to the request, filing a report on the records dispute with specified executive and congressional officials, and waiting an additional 20 days before instituting suit. *See id*.

Moreover, in response to specific concerns raised by executive branch officials, Congress amended the original bill to include heightened protections for information the executive branch likely would regard as sensitive. *See* S. Rep. No. 96-570, at 6-8. Congress did so by requiring GAO to maintain the confidentiality of records secured from the executive branch (and creating statutory penalties for the failure to do so), and by specifically barring the Comptroller General from seeking judicial recourse in three situations. *See* 1980 Act, sec. 102(d), (e), § 313, 94 Stat. at 313-14 (codified as amended at 31 U.S.C. § 716(d), (e)). First, the Comptroller General may not bring suit for records related to activities designated by the President as foreign intelligence

or counterintelligence. *See id.* sec. 102(d)(1), § 313, 94 Stat. at 313 (codified as amended at 31 U.S.C. § 716(d)(1)(A)). Second, the Comptroller General may not seek to enforce access to records if any statute specifically exempts them from disclosure to him. *See id.* sec. 102(d)(2), § 313, 94 Stat. at 313 (codified as amended at 31 U.S.C. § 716(d)(1)(B)). Third, the judicial enforcement action is unavailable if, within 20 days of the filing of his statutory report, the President or the Director of OMB certifies both that the records could be withheld under specified exemptions of the Freedom of Information Act, § 552(b)(5) or (b)(7) of title 5 (concerning documents normally privileged in civil discovery and law enforcement documents, respectively), and that the disclosure of such records "reasonably could be expected to substantially impair the operations of the Federal Government." *Id.* sec. 102(d)(3), § 313, 94 Stat. at 313 (codified as amended at 31 U.S.C. § 716(d)(1)(C)).

The certification authority, the Senate Report explained, represented a "compromise" between the competing interests of the legislative and executive branches. S. Rep. No. 96-570, at 7. The availability of certification authority would not unduly frustrate legislative interests because it would be invoked only in "unique or highly special circumstances" and was available only to the President and the Director of OMB, not to any of their designees. *Id.* at 8. Moreover, although certification would conclusively bar GAO from bringing suit, it would not bind Congress. *See id.* As the Senate Report explained, "GAO could seek the aid of a congressional committee to obtain access." *Id.* In other words, in order to accommodate the interests of both the legislative and executive branches, Congress chose to grant GAO broad authority to bring suit for access to executive branch records, but made clear that, for foreign intelligence records and other records certified by the President or the Director of OMB as deliberative and highly sensitive, Congress, rather than GAO, would be solely responsible for any enforcement effort.

Prior GAO Reviews

Since its creation, GAO has conducted thousands of investigations and evaluations of federal programs and activities. On the basis of those investigations and evaluations, GAO has issued thousands of reports to Congress and the public that provide professional, objective, fact-based, non-partisan, non-ideological reviews and analyses.[4] GAO's reviews of White House activities in recent decades alone demonstrate the myriad issues upon which GAO has reported. Some of these reviews have examined White House management or operations issues, including, for example, personnel practices;[5] alleged abuses of executive travel;[6] and information management systems.[7] Other reviews have examined issues relating to the White House's development and implementation of policy. Such reviews have involved the activities of President Clinton's China Permanent Normal Trade Relations ("PNTR") Working Group, a task force of White House advisers and department heads established at the President's request to promote passage of PNTR for China;[8] the policy recommendations of the National Performance Review, an effort led by Vice President Gore to improve the efficiency of government operations;[9] the formation and operation of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, a federal advisory committee established by President

[4] GAO issues annual reports documenting the reviews carried out by GAO. *See, e.g.*, H.R. Doc. No. 83-15 (1952). The abstracts of individual reports issued since 1975, and the full text of many reports, are available on GAO's website, http://www.gao.gov.

[5] *See, e.g., Personnel Practices: Schedule C and Other Details to the Executive Office of the President* (GAO GGD-93-14 Nov. 6, 1992); *Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President* (GAO/GGD-93-148 Sept. 9, 1993).

[6] *See, e.g., Military Aircraft: Travel by Selected Executive Officials* (GAO/AFMD-92-51, Apr. 7, 1992); *White House: Staff Use of Helicopters* (GAO/NSIAD-95-144 July 14, 1995).

[7] *See, e.g., Electronic Records: Clinton Administration's Management of Executive Office of the President E-Mail System* (GAO/GAO-01-446 Apr. 30, 2001).

[8] *See Federal Lobbying: China Permanent Normal Trade Relations (PNTR) Lobbying Activities and Costs* (GAO/GGD-00-199R Sept. 29, 2000).

[9] *See Management Reform: GAO's Comments on the National Performance Review's Recommendations* (GAO/OCG-94-1 Dec. 3, 1993).

Reagan;[10] and the distribution of speech-making guidelines by White House advisers during the Nixon Administration.[11]

Although GAO has encountered difficulties in obtaining information from the executive branch, prior to this dispute, GAO and the executive branch have generally resolved their differences in a manner that accommodated their respective concerns. In one instance, even after the Department of Justice's Office of Legal Counsel had opined that particular records sought by GAO were likely subject to a claim of executive privilege, *see* 2 Op. Off. Legal Counsel 415, 419-20 (1978) (documents prepared for the President by Council of Economic Advisors concerning estimates of unemployment due to a coal strike), the executive branch ultimately turned over many of the records to GAO. *See GAO Legislation: Hearings before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong. 78 (1979) (statement of Lawrence A. Hammond, Deputy Assistant Attorney General) (explaining that materials were provided "because the Attorney General said this is what we think the law requires"). On another occasion, when GAO reviewed "the process used by the executive branch to approve several U.N. peacekeeping operations," the Departments of State and Defense and the National Security Council ("NSC") provided a number of documents requested by GAO, but the Director of OMB made a certification under 31 U.S.C. § 716(d) to withhold certain

[10] *See Federal Advisory Committee Act: Presidential Commission on AIDS—Compliance with the Act* (GAO/GGD-89-17 Oct. 19, 1988).
[11] *See* Letter of Hon. Elmer B. Staats, Comptroller General, GAO, to Hon. Hubert H. Humphrey (B-178448 Apr. 30, 1973).

redacted portions of the NSC records. *See* Letter of Anthony H. Gamboa, Acting General Counsel, GAO, and Susan S. Westin, Managing Director, International Affairs and Trade, GAO, to Hon. Henry J. Hyde, Chairman, Committee on International Relations, and Hon. Benjamin Gilman, Chairman, Subcommittee on the Middle East and South Asia at 1, Enclosure VII (March 6, 2001) (Ex. 6). Because such certifications are not subject to judicial review, GAO referred the matter to Congress. *See id.* at 2-3. Until now, GAO has never brought suit against the executive branch to enforce its right to records.

The Present Dispute

The present dispute concerns GAO's investigation and evaluation of the activities of the NEPDG. By Memorandum dated January 29, 2001, President Bush established the NEPDG within the Executive Office of the President "to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." (Pl.'s Statement of Material Facts as to Which There is No Genuine Issue ¶ 1) ("Fact Stmt."). In particular, the NEPDG was directed "to gather information, deliberate, and . . . make recommendations to the President." (Fact Stmt. ¶ 1).

The Memorandum named, as members of the NEPDG, the Vice President; the Secretaries of the Treasury, the Interior, Agriculture, Commerce, Transportation, and Energy; the Director of the Federal Emergency Management Agency; the Administrator of the Environmental Protection Agency; and three Assistants to the President. (Fact Stmt. ¶ 2). The Vice President was directed to "lead the development" of a national energy policy, to "preside at [NEPDG] meetings," and to "direct [the NEPDG's] work." *See* Memorandum of the President to the Vice President *et al.* at 1 ("Jan. 29 Mem.) (Fact Stmt. ¶ 3). The Department of Energy was to make funds available, to the extent permitted by law, to pay the cost of support personnel, (Fact Stmt. ¶ 4), and five

Department of Energy employees, along with a White House Fellow, were eventually assigned to the Office of the Vice President to serve as NEPDG staff. (Fact Stmt. ¶ 5).

In April 2001, Representative John D. Dingell, Ranking Minority Member of the House Committee on Energy and Commerce, and Representative Henry A. Waxman, Ranking Minority Member of the House Committee on Government Reform, requested that GAO investigate "the conduct and composition of the" NEPDG. (Fact Stmt. ¶ 8). They asked GAO to determine, "[a]t a minimum, . . . who serves on this task force; what information is being presented to the task force and by whom it is being given; and . . . the costs involved in gathering the facts." (Fact Stmt. ¶ 8). Consistent with GAO's Congressional Protocols, which channel the Comptroller General's discretion and give equal priority to requests from committee chairs and Ranking Minority Members concerning a program or activity within the committee's jurisdiction, GAO opened an investigation into the NEPDG on May 7, 2001. (Fact Stmt. ¶ 9).

Following receipt of an initial request for information from GAO, (Fact Stmt. ¶ 10), the Vice President's Counsel wrote to GAO questioning the latter's authority to conduct the review. (Fact Stmt. ¶ 11). After GAO explained in writing its authority to conduct the review, (Fact Stmt. ¶ 14), the Vice President's Counsel responded with a second letter disputing GAO's authority to investigate the NEDPG's activities. (Fact Stmt. ¶ 15). This prompted GAO to send another letter to the Vice President explaining in further detail the bases for its position. (Fact Stmt. ¶ 18).

During this exchange of correspondence, the Vice President's Counsel provided GAO with a copy of a letter previously sent to several Congressmen concerning the NEPDG. (Fact Stmt. ¶ 12). The attachment to that letter indicated, among other things, that the NEPDG staff included employees of the Energy Department and a White House Fellow and that those staff

members had met with and gathered information from many individuals who were not federal employees. (Fact Stmt. ¶ 12). In addition, the attachment indicated that the Vice President convened the principals of the NEPDG for nine task force meetings held between January 29 and May 2, 2001. (Fact Stmt. ¶ 12). Neither the letter nor the attachment identified the names of the NEPDG staff members, the names of the non-federal parties with whom they met, the dates of the meetings, or the subjects discussed at those meetings. (Fact Stmt. ¶ 13). The Vice President's Counsel also provided 77 pages of information purportedly relating to expenses that the OVP incurred in connection with the NEPDG. (Fact Stmt. ¶¶ 16-17). Some of the pages were impossible to analzye, however, as they included drawings or dollar figures but did not describe the nature or purpose of the listed expenditures. (Fact Stmt. ¶ 17).

Following these limited disclosures, representatives of GAO and the OVP had several discussions, by telephone and in person, in an effort to reach an agreement concerning GAO's inquiry. (Fact Stmt. ¶ 19). To accommodate the Vice President's asserted needs, GAO representatives explained on June 29, 2001, and again on July 9, 2001, that GAO was willing to explore different ways in which the requested information could be supplied. (Fact Stmt. ¶ 20). By contrast, the Vice President's representatives flatly took the position that GAO had no authority to conduct such a review and, after being contacted again by GAO on July 12 and July 17, indicated that no additional documents would be forthcoming from the OVP or the NEPDG staff. (Fact Stmt. ¶¶ 21-23).

By letter dated July 18, 2001, the Comptroller General wrote to the Vice President formally requesting "full and complete access, under 31 U.S.C. § 716(b), to records relating to the development of the Administration's National Energy Policy." (Fact Stmt. ¶ 24). After explaining that GAO was conducting, pursuant to 31 U.S.C. §§ 712 and 717, a review of "how

the [National Energy] policy was developed," the Comptroller General requested the following information:

> (1) For each of the nine NEPDG meetings convened at the White House Complex, "the names of the attendees for each meeting, their titles, and the office represented";
>
> (2) for the six NEPDG staff persons assigned to the OVP, "their names, titles, the office each individual represented; the date on which each individual began working for such office; and the responsibilities of the group support staff";
>
> (3) for each meeting held by an NEPDG staff person to gather information relevant to the NEPDG's work, "(a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how members of the NEPDG, group support staff, or others determined who would be invited to the meetings";
>
> (4) with regard to any meetings the Vice President as chair of the NEPDG had with individuals to gather information relevant to the NEPDG, "(a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how the Vice President or others determined who would be invited to the meetings"; and
>
> (5) with regard to the direct and indirect costs of the NEPDG, "all records responsive to [GAO's prior] request, including any records that clarify the nature and rpose of the costs."

(Fact Stmt. ¶¶ 24-25). On July 30, 2001, the Comptroller General placed a call to the Vice President to discuss the outstanding access issues and to seek a solution to the impasse, but he was unsuccessful in reaching him. (Fact Stmt. ¶ 26). The next day, the Vice President's Counsel returned the call of the Comptroller General. (Fact Stmt. ¶ 27). During that call, in a good faith effort to resolve this matter, the Comptroller General stated that GAO was eliminating its request for the minutes and notes of the NEPDG meetings under investigation and for any information presented at those meetings. (Fact Stmt. ¶ 27).

Two days later, on August 2, 2001, the Vice President sent to the Senate and the House of Representatives identical letters discussing the records access dispute and asserting the Comptroller General's lack of authority to conduct the review. (Fact Stmt. ¶ 28). Although the Vice President sent copies of those letters to the Comptroller General, (Fact Stmt. ¶ 28), the Vice President neither made available the remaining records GAO sought nor suggested any form of accommodation within the 20 days following receipt of the Comptroller General's July 18 letter. (Fact Stmt. ¶ 29). Accordingly, on August 17, 2001, the Comptroller General filed a report under 31 U.S.C. § 716(b) with the President, the Vice President, the leaders of the Senate and the House of Representatives, the Director of OMB, and the Attorney General, informing them of the parties' dispute concerning access to the NEPDG records. (Fact Stmt. ¶ 30). The report reconfirmed that GAO no longer sought either the minutes or notes of the meetings under investigation, or any of the information presented at the meetings. (Fact Stmt. ¶ 30).

During the 20-day period following the filing of the August 17 statutory report, neither the President nor the Director of OMB made a certification under 31 U.S.C. § 716(d)(1)(C). (Fact Stmt. ¶ 31). Although the Vice President's Counsel did provide the names of the six NEPDG staff members on September 6, 2001, at no time since the filing of the August 17 statutory report has the OVP provided GAO with any of the remaining records in dispute. (Fact Stmt. ¶ 32).

After filing the August 17 statutory report, GAO made two additional efforts to reach a reasoned and reasonable resolution to this matter. First, on October 15, 2001, GAO's General Counsel informed the Vice President's Counsel that, in an effort to gain information relating to the NEPDG and thereby possibly avoid litigation, GAO intended to interview the NEPDG support staff identified in the OVP's September 6 communication. (Fact Stmt. ¶ 33). The Vice

President's Counsel, however, maintained that GAO had no authority to conduct such interviews. (Fact Stmt. ¶ 33). GAO was unable to arrange the interviews. (Fact Stmt. ¶ 34). Second, after four Chairs of various Senate committees and subcommittees with jurisdiction over the matters under review "urge[d]" GAO to continue its investigation, (Fact Stmt. ¶ 35), the Comptroller General, on January 24, 2002, informed the Vice President via telephone of the Chairs' request. (Fact Stmt. ¶ 36). During that conversation, the Comptroller General also clarified the nature of the information that GAO was, and was not, seeking; expressed GAO's willingness to discuss different ways in which the information could be provided; and reaffirmed GAO's desire to reach an accommodation in connection with this matter. *See* Decl. of David M. Walker ¶ 7 (Ex. 4) (Fact Stmt. ¶ 36). No compromise was reached, however, and on January 30, 2002, the Comptroller General wrote to the President Pro Tempore of the Senate and the Speaker of the House of Representatives, as well as a number of Chairmen and Ranking Minority Members of selected congressional committees, advising them that GAO was taking steps to file suit for the records in dispute. (Fact Stmt. ¶¶ 36-37). The Comptroller General also provided a copy of his letter to the President, the Vice President, and a number of other Chairmen and Ranking Minority Members. (Fact Stmt. ¶ 37). On February 22, 2002, the Comptroller General filed this suit.

ARGUMENT

A moving party should be granted summary judgment when there are no genuine issues as to any material fact, and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Smith v. Bureau of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 498 (D.D.C. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). This standard is plainly met here.

Sections 712 and 717 each independently authorizes the Comptroller General to review the activities of the NEPDG. The former authorizes the Comptroller General to investigate all

matters related to the use of public funds—*e.g.*, how money is, and ought to be, spent—and the latter authorizes him to evaluate the results of government activities—*e.g.*, to assess the value or quality of the results of governmental activities or to determine whether the activities are achieving the objectives set forth by law. The information the Comptroller General seeks here is relevant to each of these inquiries. Section 716 establishes the Comptroller General's right to inspect NEPDG records and authorizes him to enforce that right by bringing suit against the Vice President, in his capacity as Chair of the NEPDG, or as head of the Office of the Vice President.

I. SECTION 712 AUTHORIZES THE COMPTROLLER GENERAL TO INVESTIGATE THE NEPDG'S ACTIVITIES.

It is undisputed that the NEPDG used appropriated funds to finance its activities. The information the Comptroller General seeks is directly relevant to a variety of "matters related to the [NEPDG's] disbursement [and] use of public money" that the Comptroller General is entitled to investigate under 31 U.S.C. § 712. The plain language of the statute, as well as its legislative history, compel this conclusion.

A. By Its Plain Terms, § 712 Authorizes The Comptroller General To Investigate The Federally Funded Activities Of The NEPDG.

As in all cases of statutory interpretation, the starting point is the statutory language itself. *Duncan v. Walker*, 121 S. Ct. 2120, 2124 (2001). Section 712 provides in relevant part, "The Comptroller General shall—(1) investigate all matters related to the . . . disbursement [and] use of public money." 31 U.S.C. § 712.

The phrase "related to" is a singularly expansive one. Webster's Third International Dictionary defines "related" to mean, among other things, "having relationship: connected by reason of an established or discoverable relation." *Webster's Third New International Dictionary* 1916 (1993); *see also Jones v. United States*, 529 U.S. 848, 855 (2000) ("'When terms used in a statute are undefined, we give them their ordinary meaning'" (quoting *Asgrow*

Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995))). Courts have given the term its naturally broad meaning in other statutes. The Supreme Court, for example, has recognized the "broad common-sense meaning" of the phrase "relate to" when construing that phrase in the Employee Retirement Income Security Act of 1974, *see Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992) (the phrase "relate to" is "deliberatively expansive" (internal quotation marks omitted)), and has explained that "the normal sense of the phrase" means "a connection with or reference to" something else. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 & n.16 (1983) (quoting from *Black's Law Dictionary* 1158 (5th ed. 1979), which defines relate as "'To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'"); *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (same). Similarly, the Supreme Court has noted the "broad" meaning of the phrase "'relating to'" in the Airline Deregulation Act of 1978, *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), and the "highly general" nature of the word "relates" in the McCarran-Ferguson Act, *see Barnett Bank v. Nelson*, 517 U.S. 25, 38 (1996).

That the phrase "related to" is used in its broadest sense in § 712 is confirmed by the absence of any term of limitation modifying that phrase. Unlike a number of other federal statutes, § 712 does not, for example, employ the phrase "directly related" or "specifically related." *See*, *e.g.*, 5 U.S.C.A. App. 4, § 505(3) ("directly related"); 20 U.S.C. § 1232g(a)(4)(A) ("directly related"); 15 U.S.C. § 1012(b) ("specifically relates"); *see also* 10 U.S.C. § 2313(c)(1) (requiring that certain defense contracts authorize the Comptroller General to examine any records of the contractor that "directly pertain to, and involve" transactions relating to the contract). Nor does § 712 limit the Comptroller General's authority by specifying a discrete

subset of matters related to the use of public money that he may investigate, such as all matters "related to the legality" of expenditures. Rather, § 712 broadly authorizes the Comptroller General to investigate "*all* matters related to the . . . disbursement [and] use of public money." 31 U.S.C. § 712 (emphasis added).

It is beyond dispute that the NEPDG's meetings involved the "use" of appropriated funds. Such funds were used for, among other things, the salaries of NEPDG members, the support staff, and other federal officials who attended the meetings; the expenses of any federal offices or facilities used to host the meetings; and any travel costs incurred by federal employees to attend meetings. The information requested by the Comptroller General, including the names of the meeting attendees, the method by which the non-federal parties were selected to be invited to the meetings, and the subjects discussed at the meetings held by the Vice President or the NEPDG staff with non-federal parties, is relevant to several matters that have a "relationship" to, or "connection" with, the use of public funds. The Comptroller General's authority to investigate each of these matters entitles him to the requested information.

First, the information GAO seeks will reveal the purposes for which public money was used—indisputably a "matter related to" the use of public money. In investigating the NEPDG's use of public funds, GAO is entitled to learn, for example, not only how much NEPDG staff members were paid, but also what, in particular, the staff members were paid to do. The information GAO seeks will also enable it to determine, among other things, how many meetings with non-federal parties the NEPDG staff and the Vice President held, and over what period of time; what expenses were associated with those meetings, and what federal objectives were advanced or served by those meetings. The information will also allow GAO to identify and

interview both federal and non-federal meeting participants in order to confirm, or to gain further detail on, the reported purpose of a meeting.

Second, the information is relevant to determining whether federal funds were used effectively and efficiently. By examining the records at issue, GAO will be able to determine how time, and therefore money, was spent gathering information through meetings with non-federal parties. GAO will learn how many meetings were focused on one subject versus another, and how many and why meetings were held with one group versus another. GAO's investigation would disclose whether NEPDG members divided their meetings evenly among affected parties, or whether they held a disproportionate number of meetings with representatives of a single industry, or on a single subject. Once GAO reports such information, Congress will be able to reach its own judgments as to whether the NEPDG spent public funds for meetings efficiently and effectively.

Third, the information GAO seeks will enable Congress to determine whether to adopt new appropriations restrictions on the use of federal funds to conduct private meetings on matters of national policy. A number of federal laws specify that federal energy policy should be developed in a manner that takes into account a broad and diverse spectrum of publicly-solicited views. *See*, *e.g.*, 42 U.S.C. § 7112(11), (15) (establishing the Department of Energy "[t]o provide for the cooperation of Federal, State, and local governments in the development . . . of national energy policies and programs" and "[t]o provide for, encourage, and assist public participation in the development . . . of national energy programs"); 15 U.S.C. § 764(b)(1), (3), (10) (directing the former Federal Energy Administration, the functions of which are now vested by law in the Secretary of Energy, 42 U.S.C. § 7151(a), to establish a comprehensive national energy policy, to work with State and local governments, and to work with business, labor,

consumer, and other interests).[12] In order to advance other federal interests, Congress has imposed specific restrictions on the use of public funds to support federal participation in meetings, *see*, *e.g.*, 5 U.S.C. § 4110 (concerning employee training meetings); 31 U.S.C. § 1345 (concerning federally-organized meetings). Information concerning the NEPDG's meetings with non-federal parties could form the basis for comparable restrictions on the use of federal funds for meetings concerning energy policy. Based on the information presented, Congress could, for example, attach riders to appropriations laws that prohibit the executive branch from developing comprehensive energy policies through private task force meetings with only selected members of the public, or that condition the use of funds for such meetings on after-the-fact disclosures concerning the persons in attendance and the subjects discussed.

Finally, the requested information concerns a matter "related to the use . . . of public money" because it will indicate whether the Federal Advisory Committee Act, 5 U.S.C.A. App. 2 ("FACA"), applied to that use. *Cf. TVA v. Hill*, 437 U.S. 153, 174-88 (1978) (use of appropriated funds is subject to all generally applicable legislation, including the Endangered Species Act). FACA requires federal advisory committees, among other things, to provide notice of their meetings and open them to the public. FACA § 10. If the NEPDG task force meetings included non-federal parties who "regularly attend[ed] and fully participate[d],"

---

[12] Furthermore, in the past, and presently as well, Congress has required the President, in preparing a "proposed National Energy Policy Plan," to "seek the active participation by regional, State, and local agencies and instrumentalities and the private sector through public hearings in cities and rural communities and other appropriate means to insure that the views and proposals of all segments of the economy are taken into account in the formulation and review of such proposed Plan." *See* 42 U.S.C. § 7321(a) (reporting requirement made ineffective as of May 15, 2000, 31 U.S.C. § 1113 note (1999), but reinstated as of November 28, 2001, by Pub. L. No. 107-74, § 1, 115 Stat. 701 (2001)). Congress has required, moreover, that the President "insure that consumers, small businesses, and a wide range of other interests, including those of individual citizens (continued…)

regardless of whether the parties "exercise[d] any supervisory or decisionmaking authority," those meetings were subject to FACA. *See Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993). In addition, the meetings held by the Vice President and the NEPDG staff with non-federal parties were subject to FACA if any group of participants were "asked to render advice or recommendations, *as a group*, and not as a collection of individuals" and "ha[d], in large measure, an organized structure, a fixed membership, and a specific purpose." *See id.* at 913-14; *see also Food Chem. News, Inc. v. Davis*, 378 F. Supp. 1048, 1048 (D.D.C. 1974) (FACA applied to agency's two meetings with industry and consumer representatives, respectively, where purpose of meetings was to obtain each group's views on agency's draft of proposed rule). Therefore, because the information sought will help GAO to determine whether FACA applied to the NEPDG's use of public funds, that information concerns a matter "related to the use . . . of public money."

In sum, information concerning the attendees at NEPDG meetings, how non-federal parties were selected for the meetings held by the Vice President or NEPDG staff, and the subjects discussed at the latter meetings is directly relevant to the investigation of a number of "matters related to the . . . use of public money." Such information will reveal the purposes for which public money was used; whether money was spent efficiently and effectively; whether Congress should adopt new restrictions on the use of funds to ensure broad public participation in the development of national energy policy; and whether FACA applied to the NEPDG's use of funds. Because § 712 unambiguously authorizes the Comptroller General to investigate "all matters related" to the use of public funds, "the sole function of the court is to enforce it

---

(…continued)
who have no financial interest in the energy industry, are consulted in the development of the Plan." 42 U.S.C. § 7321(d).

according to its terms." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (internal quotation marks omitted); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (same); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (same).

B. The Legislative History Confirms That § 712 Authorizes The Comptroller General To Investigate The NEPDG's Activities.

In light of the plain language of § 712, there is no need to consult the statute's legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991). That history, however, amply confirms that Congress authorized the Comptroller General to obtain the information sought here.

As discussed above, Congress originally established GAO to assist Congress in the performance of its appropriation function. Concerned that it had "no power or control over appropriations after they have once been made," and "no knowledge as to how expenditures are made under these appropriations," Congress intended that GAO would "furnish information to Congress and to its committees regarding the expenditures of the Government." H.R. Rep. No. 67-14, at 7-8. GAO was expected to provide information concerning not only the legality and propriety of government expenditures, but also their efficiency and effectiveness. *See id.* at 8 (the Comptroller General "could and would be expected to criticize extravagance, duplications, and inefficiency").

Congress's intent that § 712 provide broad investigative authority was made especially clear when that section was amended during floor debate on the bill. In the original bill, § 312, the precursor to 31 U.S.C. § 712, authorized the Comptroller General to investigate "all matters relating to the receipt and disbursement of funds." *See* 67 Cong. Rec. 1090 (1921). Concerned that the terms "receipt and disbursement" might be interpreted narrowly to include merely

auditing functions, Congressman Robert Luce introduced an amendment to append the word "application" to those terms. *See id.* He explained:

> The section [312] was worded, I fear, in a way that might have led some occupant of this office to imagine that his functions were purely clerical; that is, the functions implied by the word "accountant." The words used have the savor of the bookkeeper, of the cashier, of the treasurer, not of *the investigator of the way money is spent*, not of the man who goes out and looks for trouble, not of *the man who attempts of his own initiative to find places to save money*. Therefore, I make the suggestion that we add to the words of the cashier and the treasurer and the accountant, namely, "receipt and disbursement," the word "application." If there ever was presented on this floor a single word of amendment which might have a wider extent of usefulness to the people, it has not come to my knowledge.

Id. (emphasis added). Congressman Luce added, "The [amendment's] purpose, Mr. Chairman, is to make sure that the comptroller general shall concern himself not simply with taking in and paying out money from an accountant's point of view, but that he shall also concern himself with the question as to whether it is economically and efficiently applied." *Id.* The proposed amendment passed, and the term "application" was included in the bill enacted into law.[13]

In seeking information concerning the activities of the NEPDG, the Comptroller General is assuming precisely the role intended for him: "the investigator of the way money is spent." As discussed above, he is seeking to determine the purposes for which money was expended, whether it was spent effectively and efficiently, and whether it was spent in compliance with existing laws. His examination will "furnish information to Congress and to its committees regarding the expenditures of the Government," H.R. Rep. No. 67-14, at 8, and Congress can use that information to determine, among other things, whether it wishes to exert greater "control

[13] In the 1982 recodification of title 31, Congress replaced the term "application" with "use," but this change was not intended have any substantive effect. *See* H.R. Rep. No. 97-651, 1-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-97 (describing purpose of bill "to revise, codify, and enact without substantive change" laws related to money and finance in title 31); *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) (when enacted without substantive comment, change during codification of legislation is generally held not to have been intended to alter statute's scope).

over appropriations," *id.* at 7, by adopting new restrictions on the use of federal funds to conduct meetings with members of the public on energy policy.

The legislative history thus confirms that Congress used the phrase "all matters related to the . . . use of public money" in its naturally broad sense. This history provides additional evidence, if any were needed, that the Comptroller General is entitled, under § 712, to learn the names of the persons with whom the NEPDG met, and the subjects discussed at those meetings.

II. SECTION 717 AUTHORIZES THE COMPTROLLER GENERAL TO INVESTIGATE THE NEPDG'S ACTIVITIES.

The Comptroller General is also entitled to the requested information in order to conduct an evaluation of the NEPDG's activities under § 717. That section provides in pertinent part that "[t]he Comptroller General shall evaluate the results of a program or activity . . . (1) on the initiative of the Comptroller General; . . . or (3) when a committee of Congress with jurisdiction over the program or activity requests the evaluation." 31 U.S.C. § 717(b). The development of national energy policy by the heads of eight departments or agencies created by Congress, five staff employed by one of those departments, and the Vice President is plainly "an activity the Government carrie[d] out under existing law." Both the language and the legislative history of § 717 make clear that the Comptroller General is authorized to obtain information about the NEPDG's meetings with non-federal parties in order to evaluate the results of that activity. The Vice President's various arguments to the contrary do not demonstrate otherwise.

A. The Plain Language Of § 717 Authorizes The Comptroller General To "Evaluate" The "Results" Of The NEPDG's Activities.

Section 717 authorizes the Comptroller General to "evaluate the results" of a government program or activity. The term "evaluate" means "to examine and judge concerning the worth, quality, significance, amount, degree, or condition of: APPRAISE, RATE." *Webster's Third New International Dictionary*, *supra*, at 786. Thus, according to its ordinary meaning, § 717

authorizes the Comptroller General to determine the "worth," "quality," or "significance" of the "results" of the NEPDG's activities—*i.e.*, the "consequence[s]," "effect[s]," or "conclusion[s]" of, or those things "obtained, achieved, or brought about by," the NEPDG's activities. *Id.* at 1937.

The requested information bears on the "worth," "quality," or "significance" of the most obvious "result" of the NEPDG's activities—the NEPDG's policy proposals. Where national policy proposals are developed in consultation with only a small segment of the affected public, and there are no persuasive reasons justifying such limited consultation, the Comptroller General may conclude that the proposals were not as thoroughly researched and well-founded as they might have been—*i.e.*, that the "worth," "quality," or "significance" of the proposals was not as great as it might have been—had the proposals been the product of broader public input. For example, a proposal to emphasize the promotion of one form of energy may deserve less weight if it is the product of a process that unreasonably did not solicit information from producers of other, potentially competing forms of energy. Similarly, such a proposal may deserve less weight if it is the product of a process that, by failing to solicit views from groups focused on environmental concerns, might have failed to take into account any potentially adverse environmental consequences of promoting this particular source of energy. An evaluation of the NEPDG's processes, in other words, is clearly germane to evaluating the soundness of the NEPDG's policy proposals.

Indeed, in order to determine the "quality" or "worth" of the results of various government programs and activities, Congress regularly calls upon GAO to review the quality, and adequacy, of the processes and methodologies used by government officials to achieve those results. Thus, for example, GAO's evaluation of the Census Bureau's planning processes for the

2000 census was an integral and essential part of GAO's analysis of the accuracy of the ultimate census results.[14] Similarly, GAO's analysis of the processes used to prepare for and respond to the computing challenges posed by the "Year 2000" formed an integral part of GAO's evaluation of the government's ultimate "Y2K" performance.[15] Congress itself has explicitly recognized the close relationship between process and results in the Government Performance and Results Act of 1993, Pub. L. No. 103-62, § 8, 107 Stat. 285, 294, which seeks to improve government "results" by emphasizing strategic planning, and which assigned to GAO the responsibility of reviewing the Act's implementation. *See* S. Rep. No. 103-58, at 3-4 (1993) (recognizing GAO's "long-standing interest in improving government management through the use of strategic planning and performance measurement"). It is thus contrary to both common sense and well-established practice to assert, as the Vice President does, that by "inquir[ing] into the process by which the results of the Group's work were reached," the Comptroller General is not evaluating the "'results'" of the NEPDG's activities. *See* Letter of the Vice President, to the House of Representatives at App. 2 (Aug. 2, 2001) (Compl. Ex. J) ("Vice President Aug. 2 Letter"). As GAO's long-standing practice makes clear, an inquiry into the NEPDG's processes is necessary to any evaluation of the results of the NEPDG's activities.

---

[14] *See, e.g.*, *2000 Census: Best Practices and Lessons Learned for More Cost-Effective Nonresponse Follow-up* (GAO-02-196 Feb. 11, 2002); *2000 Census: Preparations for Dress Rehearsal Leave Many Unanswered Questions* (GAO/GGD-98-74 Mar. 26, 1998); *Decennial Census: Promising Proposals, Some Progress, But Challenges Remain* (GAO/T-GGD-94-80 Jan. 26, 1994).

[15] *See, e.g., Year 2000 Computing Challenge: Lessons Learned Can Be Applied to Other Management Challenges* (GAO/AIMD-00-290 Sept. 12, 2000); *Year 2000 Computing Challenge: Federal Business Continuity and Contingency Plans and Day One Strategies* (GAO/T-AIMD-00-40 Oct. 29, 1999); *Year 2000 Computing Crisis: Potential for Widespread Disruption Calls for Strong Leadership and Partnerships* (GAO/AIMD-98-85 Apr. 30, 1998). Congress has also requested GAO to review the sufficiency of government processes in a broad range of other contexts, including, for example, weapons systems acquisitions, *see, e.g., Defense Acquisitions: Steps to Improve the Crusader Program's Investment Decisions* (GAO-02-201 Feb. 25, 2002), planning for information technology investments, *see, e.g., USDA Information Management: Proposal to Strengthen Authority of the Chief Information Officer* (GAO/T-AIMD-98-96 Mar. 3, 1998), and the development of environmental policy. *See*, *e.g.*, *Tongass National Forest: Process Used to Modify the Forest Plan* (GAO/RCED-00-45 Apr. 17, 2000).

Furthermore, the Comptroller General is entitled to information about the NEPDG's meetings in order to evaluate whether another "result" of those meetings—the degree of public participation they elicited—met objectives Congress has established by law regarding the development of the nation's energy policies. As noted above, a number of federal statutes establish, as one objective, that federal energy policy be developed in a manner that takes into account a broad and diverse spectrum of views. *See* 42 U.S.C. §§ 7112(11), (15); 15 U.S.C. § 764(b)(3), (10). Plainly, one of the "consequences" of, or matters "brought about by," the NEPDG's meetings was that some segment of the public provided its views on questions of national energy policy. Information concerning the individuals with whom the Vice President and the NEDPG staff met and the subjects discussed is thus relevant and necessary to any evaluation of whether the NEPDG's activities satisfied Congress's objective of broad public participation, or, alternatively, thwarted that objective through reassigning the responsibility for energy policy development from the Department of Energy to an establishment within the White House.[16] Indeed, such information would enable Congress to decide whether it should mandate open meetings or other forms of disclosure when members of the public provide their views on energy policy to government officials responsible for establishing such policies.[17]

Accordingly, the Comptroller General is seeking information about the NEPDG's meetings with non-federal parties precisely because the Comptroller General, in accordance with the plain language of § 717, *is* evaluating the "results" of the NEPDG's activities.

---

[16] The Comptroller General is also entitled to information about the NEPDG's meetings to evaluate whether this result, public participation in the development of national energy policy, constituted participation subject to FACA. As discussed above, *see supra* pp. 27-28, information sought by GAO will indicate whether FACA applied to the NEPDG.

[17] Congress could, for example, amend the Lobbying and Disclosure Act of 1995, 2 U.S.C. §§ 1601-1612, which currently imposes a variety of requirements on certain members of the public who meet with executive branch officials, including the Vice President, *id.* § 1602(3)(B), to influence legislation.

B. The Legislative History Of § 717 Confirms That The Comptroller General May Investigate The NEPDG's Activities In Order To Evaluate The Results Of Those Activities And The Processes Used To Achieve Those Results.

Because the plain language of § 717 is both broad and clear, there is no need to consider its legislative history. As is true in the case of § 712, however, the history of § 717 confirms that the Comptroller General is authorized to inquire into the NEPDG meetings as part of its evaluation of the results of that group's activities. Indeed, the legislative history makes clear that Congress intended the Comptroller General's authority to include evaluations of the extent to which programs or activities achieved the objectives of the law, and the quality of the processes used to achieve those results.

Congress first enacted § 717(b) as § 204(a) of the 1970 Act. As noted above, *see supra*, pp 10-12, in the years leading up to the Act, GAO had begun to assume new roles and responsibilities in assisting Congress to perform its constitutional oversight functions. In particular, GAO had begun to conduct what were then referred to as "program results reviews." *See supra* note 3 and accompanying text.

In a hearing before the committee that introduced the Senate bill that became the 1970 Act, Comptroller General Elmer Staats explained the nature of such program reviews. GAO 1969 Hearing at 7-8, 31-35. In a written statement describing the objectives of GAO's "program results" studies, Comptroller General Staats pointed to, among others, the following questions that GAO sought to answer: "Is the program accomplishing the results intended as spelled out in the legislative objectives or through implementing directives of the executive branch agency . . . ?" and "[h]ave alternative programs or procedures been examined or should they be examined for potential in achieving objectives with the greatest economic efficiency?" *Id.* at 33-34. During that hearing, Comptroller General Staats also provided Congress with a written summary that demonstrated the variety and scope of such "program results" reviews. *See id.* at 72-81. Among the examples he set forth, one GAO study reviewed "the policies and procedures used in managing [the Atomic Energy Commission's] research program." *Id.* at 72 (discussing *Administration and Management of the Biology and Medicine Research Program of the Atomic Energy Commission* (B-165117 Apr. 16, 1969)). Significantly, as Comptroller General Staats' summary explained, this GAO review suggested several areas where management procedures could be improved, but "did not relate to the quality of research performed under the program"—*i.e.*, the final result, or output, of the research program. *Id.* at 73.

Although he believed GAO already had authority to conduct such "program results" studies, Comptroller General Staats asked Congress to make that authority explicit in what became the 1970 Act. *See* Letter of Hon. Elmer B. Staats, Comptroller General, to Hon. B. F. Sisk, Chairman, Special Subcommittee on Reorganization, Committee on Rules, House of Representatives (Oct. 31, 1969) (Ex. 7) ("Staats Oct. 31 Letter"). Congress did so, specifying with respect to § 204(a): "It is intended that, in performing this function, the Comptroller

General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." *See* H.R. Rep. No. 91-1215, at 82.[18]

The legislative history of § 717 thus confirms that the Comptroller General's authority to "evaluate" the "results" of the NEPDG's activities includes the authority to determine whether those activities achieved the objectives of the law, including the objective of public participation in the development of national energy policy. The legislative history likewise confirms that, in evaluating the NEPDG's final report, the Comptroller General is authorized to examine the processes and procedures used to develop that report, to help Congress both assess the soundness of the report's recommendations and determine whether alternative, more efficient and effective processes and procedures for developing energy policy should be mandated.

* * *

In the course of the dispute leading up to this litigation, the Vice President offered various reasons why, despite the language and history of § 717, he believed the Comptroller General's

[18] As originally enacted, § 204(a) provided in pertinent part, "The Comptroller General shall review and analyze the results of Government programs and activities carried on under existing law, including the making of cost benefit studies." *See* 1970 Act, § 204(a), 84 Stat. at 1168. In reenacting § 204 in 1974, Congress amended the language in § 204(a) by changing the phrase "review and analyze" to "review and evaluate," and by dropping the phrase "including the making of cost benefit studies"; in § 204(b), Congress gave the Comptroller General further responsibilities and directed him to establish an Office of Program Review and Evalution. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, sec. 702(a), § 204, 88 Stat. 297, 326. Although there is no discussion in the legislative history specifically referring to the amendments in § 204(a), the Senate and House Conference Reports explained that the bill "amends § 204 of the 1970 Legislative Reorganization Act to expand GAO assistance to Congress" and then describes the Comptroller General's duties under §§ 204(a) and 204(b). *See* S. Conf. Rep. 93-924, at 72 (1974); H.R. Conf. Rep. No. 93-1101, at 72 (1974). In the 1982 recodification of title 31, the phrase "review and evaluate" in § 204(a) was replaced, without substantive effect, with "evaluate." *See* H.R. Rep. No. 97-651, at 1-3, *reprinted in* 1982 U.S.C.C.A.N. at 1895-97.

authority to evaluate the results of federal activities does not entitle the Comptroller General to the information concerning the NEPDG meetings. The Comptroller General addresses those arguments next.

C. Section 717 Confers On The Comptroller General Broad, Unqualified Discretion To Initiate A Program Or Activity Evaluation.

The Comptroller General has broad, unqualified discretion under § 717 to undertake a program or activity evaluation on his own initiative. *See* 31 U.S.C. § 717(b)(1) (authorizing program evaluation "on the initiative of the Comptroller General"). The Vice President has suggested, however, that the Comptroller General lacks authority to proceed under § 717 because the Comptroller General initiated his evaluation pursuant to § 717(b)(3), which authorizes evaluations "when a committee of Congress with jurisdiction over the program or activity requests" one; no committee, according to the Vice President, has made such a request to the Comptroller General. *See* Vice President Aug. 2 Letter at App. 2. The Vice President's contention is mistaken.

In an initial letter to the Vice President's Counsel, GAO explained that it was undertaking the review in response to a request from a congressional committee of jurisdiction, and in particular, the request of two Ranking Minority Members of two congressional committees of jurisdiction. *See* Letter of Anthony H. Gamboa, GAO General Counsel, to David S. Addington, Counsel to the Vice President at 1 (June 1, 2001) (Compl. Ex. F). In a subsequent letter, however, GAO made clear that the Comptroller General had initiated this review in a manner consistent with GAO's Congressional Protocols, which treat requests from both committee Chairs and Ranking Minority Members as requests from "committee leaders." *See* Letter of Anthony H. Gamboa, GAO General Counsel, to David S. Addington, Counsel to the Vice President at 8-9 (June 22, 2001) (Compl. Ex. H) ("GAO June 22 Letter"). These Protocols

channel the Comptroller General's unfettered discretion under § 717(b)(1) to undertake evaluations on his own initiative by establishing the priority by which GAO responds to various requests from members of Congress. *See GAO's Congressional Protocols* 4-5 (GAO-01-145G Nov. 2000), *at* http://www.gao.gov (Other Publications).[19] While GAO is not required by statute either to issue or to abide by these Protocols, it is within the Comptroller General's discretion to do both, and GAO, prior to submitting the Comptroller General's formal request for records under § 716, made it absolutely clear to the Vice President that it was acting pursuant to that discretion. *See* GAO June 22 Letter at 9.

In any event, there is no requirement that the Comptroller General inform the subject of a review of the reasons for the initiation of the review. The plain language of § 717 does not include any such mandate, and there is no support for any argument that it should be interpreted otherwise. Section 717 grants broad, unqualified discretion to the Comptroller General to undertake a program or activity review on his own initiative, and the initiation of the review at issue here surely falls within that discretion.[20]

[19] Under the Protocols, GAO gives the highest priority to, among others, requests from "committee leaders." *See GAO's Congressional Protocols*, *supra*, at 4-5. The Protocols define "committee leaders" to include both the Chairs and Ranking Minority Members of committees or subcommittees to enable GAO to implement effectively its role in supporting Congress in a "professional, objective, fact-based, nonpartisan, nonideological, fair, and balanced" manner. *Id.*

[20] In any event, any conceivable dispute over the basis for GAO's review under § 717(b) was rendered moot by virtue of the letter that the Comptroller General received from four Senators who chair various Senate committees and subcommittees with jurisdiction over energy and related policy matters. (Fact Stmt. 35). In that letter, those Senators urged the Comptroller General to continue the ongoing investigation. (Fact Stmt. 35). Under 31 U.S.C. § 717(b)(3), the Comptroller General is required, not merely authorized, to conduct an evaluation when requested to do so by a committee with appropriate jurisdiction.

D. The Comptroller General's § 717 Authority To Evaluate The Results Of An Activity The Government Carries Out Under "Existing Law" Includes The Authority To Evaluate The NEPDG's Activities.

The Vice President takes the remarkable position that the phrase "activities carrie[d] out under existing law" does not include the NEPDG's activities. He asserts that "existing law" in § 717 refers only to statutory law, and that the NEPDG's activities were carried out not under any statute, but pursuant solely to the President's constitutional authority. *See* Vice President Aug. 2 Letter at App. 2. By its plain terms, however, § 717 applies without limitation to all "existing law," whether constitutional or statutory. In any event, the NEPDG's development of national energy policy was an exercise of executive authority under both statutory and constitutional law.

1. The Language of § 717, and the Structure and History of the 1970 Act, Confirm that the Comptroller General has Broad Authority to Evaluate the Results of Any Government Activity Authorized by Law.

a. Under the plain language of § 717, activities carried out under "existing law" are those carried out under law that is in effect.

It is undisputable that the Constitution is a part of the "law" under which the activities of the government are carried out. *See* U.S. Const. art. VI, § 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land"). The word "exist," in turn, means "to have actual or real being . . . in space and time," "to have being in any specified condition or place or with respect to any understood limitation," or "to continue to be: maintain being," *See Webster's Third New International Directory*, *supra*, at 796. As these definitions make plain, the phrase "existing law" means simply law that is in being, or that is in effect. Thus, under the plain meaning of § 717, the Comptroller General is authorized to evaluate the results of government activities carried out

under any law, including constitutional law, that is in effect. As the NEPDG's activities were so carried out, the Comptroller General is authorized under § 717 to investigate those activities.

That the phrase "existing law" refers to all law in effect is supported by judicial interpretations of that phrase in other contexts. For example, courts have concluded that the requirement of Rule 11 of the Federal Rules of Civil Procedure, that all legal claims and defenses should be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," is satisfied when such claims and defenses are grounded in law that "pertains in the jurisdiction," *see DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989), which of course includes constitutional law. *See*, *e.g.*, *Knipe v. Skinner*, 19 F.3d 72, 75-76 (2d Cir. 1994). Similarly, the D.C. Circuit has concluded that the phrase "'existing laws'" in the Alaska Statehood Act refers to "valid" laws "'existing'" on a certain date. *See Ketchikan Packing Co. v. Seaton*, 267 F.2d 660, 662-63 (D.C. Cir. 1959); *see also City of Jonesboro v. Cairo & St. Louis R.R.*, 110 U.S. 192, 198 (1884) ("The phrase 'under existing laws,' in the section of the [Illinois] Constitution referred to, relates, we think, to the time of the adoption of the Constitution rather than to the time when the vote of the people was in fact taken.").[21]

Accordingly, § 717's plain language is sufficient, standing alone, to foreclose the Vice President's argument that "existing law" means "statutory law."

[21] The Supreme Court, moreover, has rejected on multiple occasions the contention that the word "law" should be interpreted narrowly to mean only "statutory law." *See*, *e.g.*, *Norfolk & Western Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128-29 (1991) (rejecting contention that the word "law" in the Interstate Commerce Act refers only to positive enactments, and not to common-law rules); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (rejecting contention that the phrase "laws of the several States" in the Federal Judiciary Act of 1789 includes only state statutory law, and not state common law).

b. The structure and history of the 1970 Act that added § 717 confirm the plain meaning of the phrase "existing law."

As noted above, Congress added § 717 in order to expand the Comptroller General's authority so that it could make "better use of the General Accounting Office as an arm of the Congress." *See* H.R. Rep. No. 91-1215, at 81. The structure and history of the 1970 Act confirm that Congress did not intend to limit this "better use" to evaluations of statutorily authorized activities and programs alone. Rather, Congress used the phrase "existing law" to distinguish the analytical focus of the GAO, which had already begun to engage in fact-based analyses of the results of existing programs and activities, from that of the new Congressional Research Service ("CRS"), which Congress expected to engage in more predictive analyses of activities and programs that the government might undertake in the future. *See id.* at 18.

A preliminary draft of the bill provided that CRS would have authority to analyze programs being carried out under "existing law." *See* Letter of Hon. Elmer B. Staats, Comptroller General, to Hon. B. F. Sisk, Chairman, Special Subcommittee on Reorganization, Committee on Rules, House of Representatives at 1 (Oct. 20, 1969) ("Staats Oct. 20 Letter") (Ex. 8). In response to concerns that CRS would duplicate GAO's work in conducting program reviews, *see id.*; Staats Oct. 31 Letter, Congress structured the 1970 Act to make it clear that GAO would retain responsibility for assisting Congress in its "analysis of *existing* agencies and activities." *See* H.R. Rep. No. 91-1215, at 18 (emphasis added); 1970 Act, § 204(a), 84 Stat. at 1168. CRS, in turn, was expected to provide Congress with "analyses and appraisals of any subject matter" in order to assist Congress "in determining the advisability of enacting legislative proposals, . . . estimating the probable results of such proposals and alternatives thereto, and . . . evaluating alternative methods for accomplishing the results sought." H.R. Rep. No. 91-1215, at 18; 1970 Act, sec. 321(a), § 203, 84 Stat. at 1181-85.

The House Report further acknowledges that the "new statutory responsibilities of the GAO and the CRS may occasionally result in overlapping activities." H.R. Rep. No. 91-1215, at 18. Indeed, the evaluation of the NEPDG's activities GAO seeks to conduct here can be used to illustrate both the nature of the overlap, as well as the distinct nature of the two inquiries each agency undertakes under the provisions of the 1970 Act. One "result" of the activities carried out by the NEPDG under existing law is a series of legislative proposals. As the House Report indicates, GAO can, as a means of evaluating those proposals under § 717(b), examine the activities undertaken to develop those proposals, *see id.*—in order, for example, to assess whether the proposals are the product of a balanced and comprehensive investigation. CRS, of course, also could review those same proposals under its statutory authority. In doing so, however, it would be expected to evaluate the proposals not by examining the manner in which they were developed, but rather by researching current literature and practices, and analyzing the proposals in light of its findings.[22] *See id.*

It is thus clear that Congress in no way used the phrase "existing law" as an oblique reference to statutory law. Indeed, the fact that Congress did not intend to foreclose GAO review of activities conducted pursuant to the President's constitutional powers is underscored by one of the studies Comptroller General Staats submitted to Congress as an example of the type of GAO review for which he sought express statutory authority. *See* GAO 1969 Hearing at 81; Staats Oct. 20 Letter at 2 (referring to his testimony on program reviews in the GAO 1969 Hearing). That study, similar in many ways to the review at issue here, concerned a multi-agency task force

[22] The Comptroller General also has authority to conduct reviews of legislative proposals that are not necessarily linked to the government programs or activities by which the proposals were developed. *See*, *e.g.*, 31 U.S.C. § 717(d)(1) (to help committees develop a statement of legislative goals); *id.* § 719(a)(1) (to make recommendations on legislation concerning the making and settlement of accounts); *id.* § 712(e) (to give any help requested by congressional committees with jurisdiction over revenue, appropriations, or

(continued…)

acting pursuant to a Presidential directive. The report, *Review Of Status Of Development Toward Establishment Of A Unified National Communications System* (B-166655, 1969) (Ex. 5) ("NCS Review"), evaluated the "progress being made pursuant to a 1963 Presidential directive to establish a unified National Communications System (NCS)" and made recommendations about the organizational arrangements and decision-making processes of the task force. *See* GAO 1969 Hearing at 81.

The 1963 Presidential directive was a confidential National Security Action Memorandum mandating the establishment of an NCS "to provide necessary communications for the Federal Government under all conditions ranging from a normal situation to national emergencies and international crises, including nuclear attack." National Security Action Mem. No. 252, at 1 (1963), *at* http://www.jfklibrary.org/nsam252.htm. The Presidential directive did not specify the basis for its authority, but it clearly reflected an exercise of the President's constitutional powers over foreign affairs and national security. In reviewing the task force's activities, moreover, GAO did not evaluate the activities against any statute specifically ordering or authorizing the establishment of an NCS, but against the objectives set forth in the Presidential Memorandum itself as well as concerns expressed by congressional committees about the method of achieving those objectives. *See* GAO 1969 Hearing at 81; *see also* NCS Review 1-2. By ratifying in the 1970 Act GAO's practice of conducting program reviews, Congress explicitly codified GAO's authority to review government activities carried out pursuant to the President's discharge of all of his lawfully undertaken responsibilities, not simply those carried out pursuant to statute.

(…continued)
expenditures); *id.* § 1503 (to recommend changes in law concerning amounts for which no accounting is made).

2. Even if § 717 Authorizes Evaluations Only of Government Activities Carried Out Under Statutory Law, the NEPDG's Activities Were Carried Out at Least in Part Under Statutory Law.

Even if § 717 restricted the Comptroller General's evaluations of programs or activities to those programs or activities carried out under statutory law—and, as just shown, it plainly does not—the Comptroller General is still entitled to the information he seeks in this action. The Vice President maintains that he and the other members of the NEPDG acted "only in relation to exercise of the President's constitutional authorities, including his authority 'to require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,' to 'take Care that the Laws be faithfully executed,' and, with respect to Congress, to 'recommend to their Consideration such Measures as he shall judge necessary and expedient.'" Vice President Aug. 2 Letter at App. 2; *see also* Letter of David S. Addington, Counsel to the Vice President, to Anthony H. Gamboa, GAO General Counsel at 2 (June 7, 2001) (Compl. Ex. G) (the NEPDG members "act only in relation to exercise of the authorities committed to the Executive by the Constitution, rather than by statute"). This *ipse dixit* characterization of the NEPDG's activities, however, is mistaken.

By providing recommendations to the President, the NEPDG necessarily carried out activities under a variety of statutes. In making some recommendations, the NEPDG was assisting the President in the performance of his own statutory responsibilities. For instance, the Low Income Home Energy Assistance Act authorizes the President to make available for emergencies up to $600 million more than the $1.4 billion provided by statute for home energy assistance grants. *See* 42 U.S.C. § 8621(e). The NEPDG assisted the President in his implemention of that statute by recommending that he "take steps to mitigate impacts of high energy costs on low-income consumers" by, among other things, "[s]trengthening the Low Income Home Energy Assistance Program by making $1.7 billion available annually." *See*

Report of the NEPDG: National Energy Policy 2-3 (2001) ("*NEPDG Report*"). In making other recommendations, the NEPDG members were carrying out duties assigned by statute to the agency heads themselves. For example, the Energy Policy and Conservation Act directs the Secretary of Energy to submit annually to the President a report that, among other things, details the status of the Strategic Petroleum Reserve ("SPR"), analyzes the vulnerability of the United States to interruption in supplies of petroleum products, and recommends any supplemental legislation deemed appropriate by the Secretary regarding the SPR. *See* 42 U.S.C. § 6245. The NEPDG report describes and analyzes the SPR and the nation's vulnerability to oil supply disruptions, and recommends that the President direct the Secretary of Energy "to work closely with Congress to ensure that our SPR protection is maintained." *See NEPDG Report*, *supra*, at 8-16, 8-17. Indeed, federal law requires the Secretary of Energy "to advise the President . . . with respect to the establishment of a comprehensive national energy policy," 15 U.S.C. § 764 (made applicable to the Secretary of Energy by 42 U.S.C. § 7151(a)), which of course the Secretary of Energy did by participating in the preparation of the NEPDG report itself. Accordingly, the Comptroller General is plainly seeking information about activities carried out pursuant to statutory law.

The fact, moreover, that the President may have sought the NEPDG's views also pursuant to his constitutional authorities does not affect this analysis. Whenever the President seeks advice on a matter related to the administration of a statute, and not on a matter committed by the text of the Constitution to his exclusive discretion (*e.g.*, granting a pardon), the President is not exercising constitutional power alone. For example, when the President requires the Administrator of EPA to provide her opinion on the best means for regulating emissions levels of sulfur dioxide, he is not exercising power conferred solely by the Constitution to "take Care that

the Laws be faithfully executed," U.S. Const. art. II, § 3, cl. 4, or to "require the Opinion" of the heads of any departments "upon any Subject relating to the Duties of their respective Offices," *id.* § 2, cl. 1. Neither clause standing alone, nor the two in combination, confer on the President the power to regulate sulfur dioxide emissions; indeed, in the absence of the Clean Air Act, regulating the emissions levels of this chemical would not be one of the "Duties of [the Administrator's] Office[]." In requiring the Administrator's views, therefore, the President is necessarily exercising not only his constitutional authority under the Take Care and Opinions Clauses, but also the power Congress conferred on him in the Clean Air Act. *Cf. Loving v. United States*, 517 U.S. 748, 772 (1996) (describing the President's statutory duty to develop policy concerning military capital sentencing as "interlinked" with the President's duties as Commander in Chief); *id.* at 773 ("Once delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe [sentencing] factors").

Accordingly, the Vice President's contention that the NEPDG members "act[ed] not pursuant to statute but instead only in relation to exercise of the President's constitutional authorities," Vice President Aug. 2 Letter at App. 2, is simply mistaken. Even if the President enlisted the NEPDG to assist him in the exercise of certain of his constitutional powers, the NEPDG was expected to—and in fact did—carry out its activities pursuant to statutory law as well. Thus, even if the Court were to conclude that § 717 authorizes the Comptroller General to evaluate only government activities carried out under statutory law, the Comptroller General

may nonetheless evaluate the NEPDG's activities because those activities were carried out, at least in part, under statutory law.[23]

III. SECTION 716 AUTHORIZES THE COMPTROLLER GENERAL TO BRING SUIT AGAINST THE VICE PRESIDENT FOR THE NEPDG RECORDS.

Finally, the Vice President has argued that the Comptroller General is not entitled to obtain information from him or from the NEPDG staff because the Vice President is not the head of an "agency" within the meaning of the judicial enforcement provision, § 716. *See* Vice President Aug. 2 Letter at App. 2. The plain language, structure, and legislative history of § 716, however, make unmistakably clear that Congress intended to authorize suit by the Comptroller General against the President and his high-level advisers, including the Vice President.

A. The Plain Language And Structure Of § 716 Make Clear That § 716 Authorizes The Comptroller General To Bring Suit Against The Vice President.

Section 716 establishes the Comptroller General's right to inspect agency records and prescribes the procedures to be followed in order to enforce this right. Section 716(b)(2) provides in pertinent part, "[T]he Comptroller General may bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce . . . record[s]." 31 U.S.C. § 716(b)(2). For purposes of title 31, the term "agency" is defined broadly. Section 101 provides, "In this title, 'agency' means a department, agency, or instrumentality of the United States Government." *Id*. § 101. For purposes of chapter 7 of title 31, which sets forth the Comptroller General's authorities, the term "agency" is further defined. Section 701 provides in relevant part, "In this chapter—(1) 'agency' includes the District of

[23] GAO's authority to conduct this review under §§ 712 or 717 is confirmed by the fact that other members of the NEPDG, in particular, the Secretary of Energy, the Secretary of the Interior, and the Administrator of the Environmental Protection Agency, provided GAO with precisely the same type of information sought here. *See* Decl. of Margaret J. Reese ¶¶ 4-5 (Ex. 1).

Columbia government but does not include the legislative branch or the Supreme Court." *Id.* § 701.

Both the NEPDG and the OVP are "instrumentalities" of the United States Government. An "instrumentality" is "something by which an end is achieved: MEAN'" or "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." *Webster's Third New International Dictionary*, *supra*, at 1172; *see also Black's Law Dictionary* 802 (7th ed. 1999) (defining "instrumentality" as "A thing used to achieve an end or purpose" or "A means or agency through which a function of another entity is accomplished, such as a branch of a governing body"). Both the NEPDG and the OVP, the latter of which is a component of the Executive Office of the President, *see* Reorganization Plan No. 1 of 1977, 5 U.S.C.A. App. 1, at 440 (West 1996) are "part," or "subsidiary branches," of the United States Government through which one or more executive branch functions, including the development of national energy policy, are carried out.

Indeed, the proviso in § 701(1) confirms that Congress used the term "agency" in its broadest sense. The proviso exempts from the sweep of this term the Supreme Court and the entire legislative branch of the United States. 31 U.S.C. § 701(1). Because this exemption does not extend to any aspect of the executive branch, the term "agency" necessarily embraces all instrumentalities of the executive branch, including both the NEPDG and the OVP. Moreover, if Congress had used the term "agency" to denote what are traditionally considered the departments and agencies of the federal government, there would have been no need for such an exemption.

The original language of § 716, *see* 1980 Act, sec. 102, § 313, 94 Stat. at 312-14, which Congress replaced, without intending any substantive effect, in the 1982 recodification of title

31, *see* H.R. Rep. No. 97-651, at 1-3, *reprinted in* 1982 U.S.C.C.A.N. at 1895-97, likewise confirms that the NEPDG and the OVP are agencies within the meaning of § 716. The original language authorized the Comptroller General to bring suit against the head of a "department or establishment." 1980 Act, sec. 102, § 313, 94 Stat. at 312 (codified 31 U.S.C. § 54(b)). Those terms were defined in part to mean "any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government." *See* 1921 Act, § 2, 42 Stat. at 20 (codified at 31 U.S.C. § 2). Plainly, the OVP is an "office . . . of the Government." Similarly, the NEPDG constitutes a "board," *see Webster's Third New International Dictionary*, *supra*, at 243 (defining "board" to mean, among other things, "a number of persons appointed or elected to sit in council for the management or investigation of a public or private business, trust, or other organization or institution"); *see also Black's Law Dictionary*, *supra*, at 166 (defining "board" as "A group of persons having managerial, supervisory, or advisory powers"), or "other establishment of the Government." *See* President Jan. 29 Mem. at 1 (President "established" NEPDG); *see also Webster's Third New International Dictionary*, *supra*, at 778 (defining "establishment" as "something that has been established").

Finally, the plain meaning of § 716 is confirmed by the structure of the provision itself, which contemplates the potential disclosure of the most sensitive, high-level information within the executive branch, including information within components of the White House. *See Raygor v. Regents of the Univ. of Minnesota*, 122 S. Ct. 999, 1007 (2002) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))). The exemption for materials relating to foreign intelligence or foreign counterintelligence activities requires that the designation of such materials be made by the

President. 31 U.S.C. § 716(d)(1)(A). The certification procedures for those FOIA-exempt materials, the disclosure of which could "impair substantially the operations of the" United States, require that the President or the Director of OMB make this certification, and specify that such certification authority shall be nondelegable. *Id.* §§ 716(d)(1)(C), (d)(2). Congress's framework for exempting highly sensitive materials, and in particular its insistence that the President, or at least the Director of OMB, personally invoke the exemption, clearly indicates that Congress envisioned that the Comptroller General could, and would, bring suit under § 716 for records under the control of high-level officials at the White House.

Accordingly, both the plain language and structure of § 716 make clear that, in his capacities as both the head of the OVP and the head of the NEPDG, the Vice President is "the head of [an] agency" for purposes of § 716.

B. The Legislative History Of § 716 Makes Unmistakably Clear Congress's Intent To Authorize The Comptroller General To Bring Suit Against The President And His High-Level Advisers, Including The Vice President.

The legislative history makes irrefutably clear that Congress intended to authorize suit against the President's closest and most senior advisers. Congress enacted § 102 of the 1980 Act in response to the obstacles that GAO encountered in obtaining information from the executive branch. After receiving testimony from the Comptroller General about those difficulties and their adverse effects on GAO's work, *see*, *e.g.*, GAO 1969 Hearing at 34-36; H.R. Rep. No. 96-425, at 5, Congress gave the Comptroller General litigating authority to enforce his right of access to executive branch records, including those records in the possession of components of the White House. *See* H.R. Rep. No. 96-425, at 10.

First, in discussing the significance of the certification mechanism, the Senate report expressly acknowledged the Comptroller General's authority to bring suit against the President and his high-level advisers. The Senate report provided:

> [W]ith regard to enforcement actions at the Presidential level, certifications provided for under section 102(d)(3) of the bill are intended to authorize the President and the Director of the Office of Management and Budget to preclude a suit by the Comptroller General against the President and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President, for information which would not be available under the Freedom of Information Act.

S. Rep. No. 96-570, at 8. The introductory phrase, "with regard to enforcement actions at the Presidential level," could not be more clear in indicating that Congress intended § 102 to authorize enforcement actions against the President and others near his level. Congress's explanation of the effect of certifications, moreover, plainly demonstrates its expectation that, absent a certification, there would be suits "against the President and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President." *See id.*

Second, both the Senate and House Reports include as an appendix a statement prepared by then Comptroller General Staats detailing GAO's difficulties in gaining access to records from, among others, the White House. *See id*. at 22-27 (Appendix); H.R. Rep. No. 96-425, at 27-32 (Appendix B). With respect to "Difficulties with Federal Agencies," the statement discusses, as its first category of problems, two disputes involving "serious access to records difficulties at the White House." S. Rep. No. 96-570, at 22; H.R. Rep. No. 96-425, at 27. In the first case, GAO was reviewing federal planning efforts in relation to a coal strike, and sought from the Council of Economic Advisors ("CEA") records concerning the CEA's development and evaluation of unemployment estimates. *See* S. Rep. No. 96-570, at 22; H.R. Rep. No. 96-425, at 27. In the second case, GAO was reviewing whether United States Metric Board members were appointed from segments of the concerned communities as required by statute, and requested records necessary to that determination. *See* S. Rep. No. 96-570, at 22; H.R. Rep.

No. 96-425, at 27. In each case, the White House refused to turn over the documents, although in the former, it eventually provided GAO with most of the records. *See* S. Rep. No. 96-570, at 22; H.R. Rep. No. 96-425, at 27. Both the Senate and House Reports refer to the appended statement as summarizing the types of access problems that the legislation was meant to address. *See* S. Rep. No. 96-570, at 5; H.R. Rep. No. 96-425, at 4. The fact that the statement detailed difficulties with the White House—and indeed highlighted them as a category of difficulties involving "federal agencies"—makes clear that Congress created the judicial enforcement action with the expectation and intent that it would cover actions for records within the White House. *See Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tele. Co.*, 464 U.S. 30, 36 (1983) ("'As in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.'" (alterations in original) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979))).

Finally, in other sections of the 1980 Act, Congress expanded the Comptroller General's right of access to records, including those of the President. In § 101, Congress granted the Comptroller General a right of access, subject to exception for reasons relating to foreign intelligence and law enforcement, to records concerning "unvouchered" or confidential expenditures. 1980 Act, sec. 101, § 117, 94 Stat. at 311-12; *see also* S. Rep. No. 96-570, at 3; H.R. Rep. No. 96-425, at 3. Such expenditures are those "accounted for solely on the approval, authorization, or certificate of the President of the United States or an official of an executive agency." 1980 Act, sec. 101 § 117, 94 Stat. at 311. As one section of the 1980 Act expanded the Comptroller General's right to records, including records of the President, and another authorized the Comptroller General to bring suit to enforce its right to records, Congress surely was aware that the latter would be available to enforce the former. Indeed, during the

congressional hearings on an earlier version of the bill, the Director of OMB brought that precise point to Congress's attention in both his live testimony and his written submission. *See* 1979 Hearing at 89, 110. The provision authorizing suit, he explained, "could potentially permit the Comptroller General to sue to compel the disclosure of the same documents which section 101 of H.R. 24 [*i.e.*, the exceptions therein] would deny him access." *Id.* Thereafter, Congress amended the bill to specify the three categories of records that the Comptroller General may not obtain by suit: records designated by the President as pertaining to intelligence, records exempted from disclosure to the Comptroller General by statute, and records certified by the President or OMB Director. This testimony, and Congress's response to it, provide even further, indisputable evidence that Congress knew that the enforcement provision would apply to actions for records within the White House and intended precisely that result.

Accordingly, the language, structure, and legislative history of § 716, independently, and in combination, make unmistakably clear Congress's intent to authorize the Comptroller General to bring suit for records against the President and his high-level advisers, including the Vice President.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court grant plaintiff's motion for summary judgment.

Respectfully submitted,

Carter G. Phillips (Bar No. 264176)
Michael A. Nemeroff (Bar No. 149856)
Joseph R. Guerra (Bar No. 418532)
Gia B. Lee (*pro hac vice* motion pending)

SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel. (202) 736-8000
Fax (202) 736-8711

Anthony H. Gamboa
Gary L. Kepplinger
Lynn H. Gibson
Joan M. Hollenbach (Bar No. 415654)
Susan D. Sawtelle (Bar No. 362659)

GENERAL ACCOUNTING OFFICE
441 G Street, N.W.
Washington, D.C. 20548
Tel. (202) 512-5400
Fax (202) 512-7703

Attorneys for Plaintiff Comptroller General of the United States

Dated: April 11, 2002